

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A22-1181**

In the Matter of the Civil Commitment of: Dale Allen Lindsey.

**Filed January 17, 2023  
Affirmed  
Larkin, Judge**

Commitment Appeal Panel  
File No. AP19-9188

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Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Wheelock, Judge.

**NONPRECEDENTIAL OPINION**

**LARKIN**, Judge

Appellant, who was committed to the Minnesota Sex Offender Program as a sexually dangerous person, challenges the decision of the Commitment Appeal Panel to deny his petition for transfer to Community Preparation Services. We affirm.

## FACTS

Appellant Dale Allen Lindsey challenges the decision of the Commitment Appeal Panel (CAP)<sup>1</sup> to deny his petition for transfer to Community Preparation Services (CPS). Lindsey was indeterminately committed to the Minnesota Sex Offender Program (MSOP) in 2006 as a sexually dangerous person (SDP). Lindsey is currently in Phase II of the three-phase MSOP treatment program.

In 2018, Lindsey petitioned the Special Review Board (SRB) for a transfer to CPS, a provisional discharge, and a full discharge from his civil commitment as an SDP. The SRB recommended denial of all three requests, and Lindsey timely petitioned for rehearing and reconsideration by the CAP.

In April 2021, the CAP held an initial hearing on Lindsey's request. The CAP received exhibits from Lindsey and respondent Commissioner of Human Services, as well as testimony from Lindsey and the court-appointed examiner, Dr. Amanda Powers. At the close of Lindsey's case, the commissioner moved to dismiss Lindsey's petition. The CAP granted the motion to dismiss Lindsey's requests for provisional and full discharge. But the CAP found that Lindsey had presented sufficient evidence to proceed to a second hearing on his request for transfer.

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<sup>1</sup> We refer to the entity formerly known as the supreme court appeal panel or judicial appeal panel as the Commitment Appeal Panel. *See* Minn. Stat. §§ 253D.28, subd. 1(a) (providing for review by “the judicial appeal panel established under section 253B.19, subdivision 1”); 253B.19, subd. 1 (2022) (providing that the supreme court shall establish an appeal panel).

In April and June 2022,<sup>2</sup> the CAP held a second hearing on Lindsey’s request for transfer. The CAP once again received exhibits from Lindsey and the commissioner, and it heard testimony from the MSOP operations manager at CPS, Michelle Sexe; the MSOP clinical courts services director, Christopher Schiffer; the court-appointed examiner, Dr. Powers; a Department of Human Services forensic evaluator, Dr. Rachal Mack; and Lindsey. The CAP determined that Lindsey failed to demonstrate by a preponderance of the evidence that transfer was appropriate and denied his petition. Lindsey appeals.

### **DECISION**

Lindsey’s petition for transfer was a petition for reduction in custody under Minn. Stat. § 253D.27 (2022) of the Minnesota Commitment and Treatment Act: Sexually Dangerous Persons and Sexual Psychopathic Personalities (MCTA), Minn. Stat. §§ 253D.01-.36 (2022). *See* Minn. Stat. § 253D.27, subd. 1(b) (“For the purposes of this section, ‘reduction in custody’ means transfer out of a secure treatment facility, a provisional discharge, or a discharge from commitment.”).

The MCTA provides standards that must be followed when granting a discharge or transfer. “A person who is committed as [an SDP] . . . shall not be transferred out of a secure treatment facility unless the transfer is appropriate. Transfer may be to other treatment programs under the commissioner’s control.” Minn. Stat. § 253D.29, subd. 1(a). The CAP must consider the following factors when evaluating a request for transfer: “(1) the person’s clinical progress and present treatment needs; (2) the need for security to

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<sup>2</sup> The CAP noted the “unacceptable length of time” between the hearings.

accomplish continuing treatment; (3) the need for continued institutionalization; (4) which facility can best meet the person's needs; and (5) whether transfer can be accomplished with a reasonable degree of safety for the public." *Id.*, subd. 1(b).

When the CAP reviews the SRB's recommendation regarding a petition for reduction of custody, the petitioner "bears the burden of going forward with the evidence, which means presenting a prima facie case with competent evidence to show that the person is entitled to the requested relief." Minn. Stat. § 253D.28, subd. 2(d). If the petitioner meets his burden of production, the opposing party bears the burden to prove by clear and convincing evidence that the petition should be denied. *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 223 (Minn. 2021).

We review the CAP's decision on a petition for transfer for clear error. *In re Civ. Commitment of Edwards*, 933 N.W.2d 796, 803 (Minn. App. 2019), *rev. denied* (Minn. Oct. 15, 2019). "[T]he role of an appellate court is not to weigh, reweigh, or inherently reweigh the evidence when applying a clear-error review; that task is best suited to, and therefore is reserved for, the factfinder." *Kenney*, 963 N.W.2d at 223. Instead, the court's role is to review "the record to confirm that evidence exists to support the decision." *Id.* at 222. An appellate court must

fully and fairly consider the evidence, but so far only as is necessary to determine beyond question that it reasonably tends to support the findings of the factfinder. When the record reasonably supports the findings at issue on appeal, it is immaterial that the record might also provide a reasonable basis for inferences and findings to the contrary.

*Id.* at 223 (quotations and citation omitted). In addition, the reviewing court defers to the CAP's evaluation of expert testimony. *In re Civ. Commitment of Fugelseth*, 907 N.W.2d 248, 256 (Minn. App. 2018), *rev. denied* (Minn. Apr. 17, 2018). An appellate court will affirm the CAP's decision so long as it is supported by the record as a whole, even if the evidence is conflicting. *See Kenney*, 963 N.W.2d at 226-27 (concluding that the CAP did not clearly err because "[a]lthough there is conflicting evidence, the CAP's finding is supported by the record as a whole").

## I.

Lindsey contends that the CAP clearly erred by relying on Dr. Mack's testimony as a basis to deny transfer. The CAP noted that "[b]oth Dr. Powers and Dr. Mack offered helpful expert testimony." But after considering the evidence as a whole, the CAP found Dr. Mack's opinion "more persuasive." This court "generally defers to the CAP's evaluation of expert testimony." *Edwards*, 933 N.W.2d at 805.

Lindsey raises several challenges to Dr. Mack's testimony on appeal, including that Dr. Mack was not qualified as an expert. But in the proceedings before the CAP, Lindsey did not object to Dr. Mack's qualifications or her testimony. An appellate court generally will not consider an argument that was not considered and decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). That principle also applies in appeals from decisions of the CAP. *See In re Civ. Commitment of Kropp*, 895 N.W.2d 647, 653 (Minn. App. 2017) (refusing to consider an issue that was not properly raised because it was not presented to the CAP), *rev. denied* (Minn. June 20, 2017). Because Lindsey did

not dispute the admissibility of Dr. Mack's testimony in the proceedings before the CAP, that issue is not properly before us on appeal.

Nonetheless, we note that we discern no error or prejudice stemming from the admission of Dr. Mack's testimony. The commissioner indicates, and Lindsey does not dispute, that Dr. Mack has appeared as an expert witness before the CAP several times. In addition, Lindsey had the opportunity to cross-examine Dr. Mack and to challenge her qualifications and credibility. For example, Lindsey argues Dr. Mack's testimony was contradictory and her records were incomplete. But Lindsey cross-examined Dr. Mack regarding such errors, and the record shows that the CAP was aware of and considered them when making its decision. The CAP noted that Dr. Mack misidentified one type of report on which she had relied, but it concluded that "these clerical type errors did not diminish Dr. Mack's overall opinion." The CAP also acknowledged that Dr. Mack referenced a report that had not been offered into evidence, but it determined that "Dr. Mack testified and was asked extensively about the bases for her opinion, which [have] remained consistent."

Lindsey also argues that because Dr. Mack based her opinion on his behavioral expectation reports (BERs), the CAP's reliance on Dr. Mack's testimony was inconsistent with its statement that it did not find the BERs determinative regarding transfer. The CAP explicitly stated that it found Dr. Powers's analysis of the BERs more credible, and it did not weigh them against Lindsey. As the trier of fact, the CAP was "free to accept part and reject part" of Dr. Mack's testimony. See *Coker v. Jesson*, 831 N.W.2d 483, 492 (Minn.

2013) (stating that “a trier of fact is free to accept part and reject part of a witness’s testimony”).

In sum, the record does not suggest prejudicial error stemming from the admission of Dr. Mack’s testimony. We are not permitted to reweigh that testimony, and we discern no basis to conclude that the CAP clearly erred in determining that it was credible.

## **II.**

Lindsey contends that the record as a whole does not support the CAP’s decision. Specifically, Lindsey argues that the CAP should have followed Dr. Powers’s recommendation for transfer, that it ignored evidence that supported transfer, and that it failed to explain its decision in denying the petition for transfer.

The record establishes that Dr. Powers diagnosed Lindsey with Other Specified Paraphilic Disorder (non-consent sexual behavior and elements of sexual sadism), Antisocial Personality Disorder, Narcissistic Personality Disorder, and Cocaine Use Disorder (by history). She filed two reports, one in August 2020 and an updated report in March 2021. In the 2020 report, Dr. Powers indicated that Lindsey did not meet the statutory criteria for transfer, that he had made insufficient progress in treatment, that his risk for sexual recidivism had not been mitigated, and that his treatment needs would be best met in his current setting.

In her 2021 report, Dr. Powers indicated that Lindsey was making significant progress in treatment. Dr. Powers testified, consistent with her updated report, that Lindsey was actively engaged with treatment, that he had worked on managing his emotions, and that the therapeutic community at CPS would best meet his treatment needs. Dr. Powers

was the only witness to support Lindsey's transfer to CPS. Yet Dr. Powers also agreed that a move to CPS could be destabilizing for Lindsey and acknowledged that "for [Lindsey], personality disorders tend to show their symptoms more prominently when under stress, and the change [in transferring to CPS] could be stressful for him."<sup>3</sup>

In contrast, Dr. Mack testified that "it would be detrimental to the therapeutic community to move [Lindsey] out [to CPS] until he has demonstrated some more stability" and that Lindsey's "emotional regulation really needs some . . . targeted treatment." Dr. Mack identified several risk factors for Lindsey including hostility towards women, poor cognitive problem solving, negative emotionality, lack of concern for others, impulsivity, general social rejection, and deviant sexual interests. Dr. Mack testified that CPS clients need to be self-controlled and self-accountable to succeed and that in her opinion, Lindsey lacked the self-regulation skills that would allow him to be successful.

Lindsey argues that the CAP ignored evidence that supported transfer. He states in his reply brief that Dr. Mack presented a "demonstrably erroneous analysis and understanding of the records." But the testimony of two other witnesses supported Dr. Mack's opinion that Lindsey's clinical progress showed an ongoing need to improve his emotional regulation before he can safely move to a less secure facility. For example, Ms. Sexe testified regarding the culture at CPS. She explained that CPS is a less restrictive therapeutic environment and that disruptive clients can disturb the treatment community and impede on other clients' progress. Mr. Schiffer similarly testified that dysregulated

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<sup>3</sup> In fact, at the initial hearing before the CAP, Dr. Powers testified that "it's probably obvious that this is not the . . . strongest case for CPS."



behavior disrupts the safety and security of CPS and that the MSOP clinical leadership team had determined that Lindsey lacked the internal control necessary to safely self-regulate while at CPS. A 2021 quarterly report bolstered that testimony, noting: “During situations that turned emotionally intense for [Lindsey], it was apparent that he tried using pro-social skills[,] however, his mistrust and abuse and vulnerability to harm schemas often championed in the moment.” This record supports the CAP’s determination that Lindsey needed to develop more emotional-management skills and consistently put those skills into practice before transferring to CPS.<sup>4</sup>

Consistent with Dr. Powers’s testimony, the CAP acknowledged the progress that Lindsey had made. The CAP noted Lindsey’s clinical progress in treatment, agreed with Dr. Powers’s testimony that Lindsey was managing “very well” day-to-day considering the circumstances, and stated that it is “impressive and important that [Lindsey] has not given up and has continued to make forward progress in treatment.” Although the record contains evidence in support of transfer, the CAP found Dr. Mack’s testimony more credible and determined that the record “[does] not demonstrate that [Lindsey] has made significant progress on his emotional regulation and self-management,” which is necessary to succeed at CPS.

The question for this court is not whether the record *could* support a finding that Lindsey is eligible for transfer, but whether the CAP clearly erred by finding that it is not yet appropriate to transfer Lindsey to CPS. *See Fugelseth*, 907 N.W.2d at 256. Even

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<sup>4</sup> Although the CAP determined that Lindsey should remain in a secure facility, it stated that Lindsey “could benefit from more prosocial peers that may be available in St. Peter.”

though the evidence was conflicting, the record as a whole supports the CAP's determinations that CPS would not be the best facility to meet Lindsey's present needs and that he needed to make more clinical progress before transfer is appropriate. Moreover, the CAP adequately explained its decision. On this record, the CAP did not clearly err in denying Lindsey's petition for transfer.

**Affirmed.**